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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

(HONORABLE JAN M. ADLER)

UNITED STATES OF AMERICA, Plaintiff, v. HECTOR FRANCISCO GALVAN-VELASQUEZ, Defendant.	)	Case No. 08CR1482-DMS (JMA) STATEMENT OF FACTS AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTIONS

I.

THIS COURT SHOULD SUPPRESS ANY STATEMENTS MADE BY MR. GALVAN-VELASQUEZ

A. Mr. Galvan-Velasquez's Alleged Statements to Agent Juarez Must Be Suppressed Because the Government Cannot Demonstrate Compliance With Miranda.

The prosecution may not use statements, whether exculpatory or inculpatory, stemming from a custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. Miranda v. Arizona, 384 U.S. 436, 444 (1966).[1] Custodial interrogation is questioning initiated by law enforcement officers after a person has been taken into custody

[1] In Dickerson v. United States, 530 U.S. 428 (2000), the Supreme Court held that Miranda rights are no longer merely prophylactic, but are of constitutional dimension. Id. at 444 ("we conclude that Miranda announced a constitutional rule").

or otherwise deprived of his freedom of action in any significant way. Id. See Orozco v. Texas, 394 U.S. 324, 327 (1969). In United States v. Beraun-Panez, 812 F.2d 578 (9th Cir. 1987), the Ninth Circuit found that an individual questioned out in an open field, who was neither held nor handcuffed, nor told that he was under arrest, was nonetheless in custody for Miranda purposes.

Once a person is in custody, Miranda warnings must be given prior to any interrogation. See United States v. Estrada-Lucas, 651 F.2d 1261, 1265 (9th Cir. 1980). Those warnings must advise the defendant of each of his or her "critical" rights. See United States v. Noti, 908 F.2d 610, 614 (9th Cir. 1984). In order for the warning to be valid, it cannot be affirmatively misleading. United States v. San Juan-Cruz, 314 F.3d 384, 387 (9th Cir. 2002). Rather, the warning must be clear and not susceptible to equivocation. Id. If a defendant indicates that he wishes to remain silent or requests counsel, the interrogation must cease. Miranda, 384 U.S. at 474; see also Edwards v. Arizona, 451 U.S. 477, 484 (1981).

Here, Mr. Galvan-Velasquez was apprehended by Agent Juarez while he was allegedly attempting to climb the Secondary Border Fence. The report issued by Agent Juarez states that, while still in the field at the Border Fence area, Agent Juarez obtained inculpatory statements from Mr. Galvan-Velasquez. There is, however, no written waiver executed by Mr. Galvan-Velasquez demonstrating that he received Miranda warnings or waived his rights as to those alleged statements. Moreover, Agent Juarez does not even claim in his report to have given any Miranda warnings prior to questioning Mr. Galvan-Velasquez. Accordingly, because Agent Juarez conducted a custodial interrogation of Mr. Galvan-Velasquez without any Miranda warnings and without obtaining a knowing wavier of his rights, Mr. Galvan-Velasquez's alleged statements in the field must be suppressed.

B. Mr. Galvan-Velasquez's Alleged Statements to Agent Hawkins Must Be Suppressed Unless the Government Can Demonstrate That Mr. Galvan-Velasquez's Alleged Waiver of His Rights Was Voluntary, Knowing, and Intelligent.

When interrogation occurs without the presence of an attorney and a statement is taken, the government has a heavy burden to demonstrate that the defendant knowingly, voluntarily, and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. Miranda, 384 U.S. at 475; See United States v. Heldt, 745 F.2d 1275, 1277 (9th Cir. 1984) (the burden on the government is great). Under prevailing Ninth Circuit law, the Government bears the burden of demonstrating a proper waiver by clear and convincing evidence. Schell v. Witek, 218 F.3d 1017, 1023-24 (9th Cir. 2000) (en banc) (constitutional rights may ordinarily be waived only if it can be established by clear and convincing evidence that the waiver is voluntary, knowing, and intelligent). Moreover, this Court must "indulge every reasonable presumption against waiver of fundamental constitutional rights." Id. (citations omitted). Thus, unless and until the prosecution meets its burden of demonstrating through evidence that adequate Miranda warnings were given and that the defendant knowingly and intelligently waived his rights, no evidence obtained as result of the interrogation can be used against the defendant. Miranda, 384 U.S. at 479.

In determining whether a waiver has been knowingly and intelligently made, the court must inquire into whether "the waiver [was] made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it." Derrick v. Peterson, 924 F.2d 813, 820-821 (9th Cir. 1990) (quoting Colorado v. Spring, 479 U.S. 564, 573 (1987)). Thus, "[o]nly if the 'totality of the circumstances surrounding the interrogation' reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived." Id. (quoting Colorado v. Spring, 479 U.S. at 573) (emphasis in original) (citations omitted)).

Here, the video of Mr. Galvan-Velasquez's interrogation at the station clearly indicates significant confusion on the part of Mr. Galvan-Velasquez.[2] Specifically, Mr. Galvan-Velasquez could not understand the poor Spanish pronunciation of Agent Hawkins. As a result, another agent had to re-read Mr. Galvan-Velasquez his rights. Hence, before any alleged statements by Mr. Galvan-Velasquez made to Agent Hawkins can be used against him, the government must prove to this Court's satisfaction that the second reading of his constitutional rights cured Mr. Galvan-Velasquez's confusion to the point of complete comprehension, such that his waiver was knowing and intelligent.

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[2] Although Mr. Galvan-Velasquez does not dispute the accuracy of the government's English translation of this interrogation, the transcript fails to capture Mr. Galvan-Velasquez's inability to understand Agent Hawkins. The defense, therefore, urges the Court to review the video for context and will be happy to provide a copy on DVD.

C. Any Alleged Statements by Mr. Galvan-Velasquez Should Be Suppressed Unless the Government Can Demonstrate That They Were Voluntarily Made.

Even assuming this Court finds that the Miranda warnings were sufficient here and the waiver was knowing and intelligent, the government must further demonstrate that such waiver and the subsequent statements were voluntary made. Indeed, even when the procedural safeguards of Miranda have been satisfied, a defendant in a criminal case is deprived of due process of law if the conviction is founded upon an involuntary confession. Arizona v. Fulminante, 499 U.S. 279 (1991); Jackson v. Denno, 378 U.S. 368, 387 (1964). The government bears the burden of proving by a preponderance of the evidence that a confession is voluntary. Lego v. Twomey, 404 U.S. 477, 483-484 (1972).

In order to be voluntary, a statement must be the product of a rational intellect and free will. Blackburn v. Alabama, 361 U.S. 199, 208 (1960). In determining whether a defendant's will was overborne in a particular case, the totality of the circumstances must be considered. Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973). Some factors taken into account have included the youth of the accused, his lack of education, his low intelligence, the lack of any advice to the accused of his constitutional rights, the length of the detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep. Id.

Further, a confession is deemed involuntary whether coerced by physical intimidation or psychological pressure. "The test is whether the confession was 'extracted by any sort of threats or violence, [or] obtained by any direct or implied promises, however slight, [or] by the exertion of any improper influence.'" Hutto v. Ross, 429 U.S. 28, 30 (1976) (quoting Bram v. United States, 168 U.S. 532, 542-43 (1897)). Accord, United States v. Tingle, 658 F.2d 1332, 1335 (9th Cir. 1981).

Here, the defense has a good faith basis to believe that unnecessary force was used in the apprehension of Mr. Galvan-Velasquez, rendering suspect the voluntariness of any subsequent statements. Until the government meets its burden of showing all statements of the defendant that it intends to use at trial were voluntarily made, all statements must be suppressed as involuntary.

D. Defendant Requests That This Court Conduct an Evidentiary Hearing.

This Court must make a factual determination as to whether a confession was voluntarily given prior to its admission into evidence. 18 U.S.C. § 3501(a). When a factual determination is required, courts are obligated by Fed. R. Crim. P. 12 to make factual findings. See United States v. Prieto-Villa, 910 F.2d 601, 606-10 (9th Cir. 1990). Because "'suppression hearings are often as important as the trial itself,'" id. at 609-10 (quoting Waller v. Georgia, 467 U.S. 39, 46 (1984)), these findings should be supported by evidence, not merely an unsubstantiated recitation of purported evidence in a prosecutor's responsive pleading.[3]

Under section 3501(b), this Court must consider various enumerated factors in making the voluntariness determination, including whether the defendant understood the nature of the charges against him and whether he understood his rights. Without the presentation of evidence, this Court cannot adequately consider these statutorily mandated factors. Mr. Galvan-Velasquez accordingly requests that this Court conduct an evidentiary hearing pursuant to 18 U.S.C. § 3501(a), to determine whether any of his alleged statements were voluntary. Moreover, defendant sees no reason why this hearing -- as well as any arguments on defendant's motions -- cannot take place directly before trial, as the necessary witnesses will all be present at that time. The defense estimates that any such hearing and arguments would take no more than one hour.

II.

THIS COURT SHOULD DISMISS THE INFORMATION BECAUSE IT FAILS TO ALLEGE AN ESSENTIAL ELEMENT OF THE OFFENSE

Mr. Galvan-Velasquez has been charged with attempted entry in violation of 8 U.S.C. § 1325. The information fails to state that offense, however, because it does not allege that he acted with specific intent. In United States v Fuentes, 252 F.3d 1030 (9th Cir. 2001), the defendant was charged with attempted illegal reentry in violation of 8 U.S.C. § 1326. He moved to dismiss the indictment, arguing that it failed to allege the specific intent element required in attempt crimes. The Ninth Circuit agreed, holding that, because the attempt crime -- as opposed to the completed crime -- implicitly contained the common law element of specific intent, the indictment was deficient in its failure to allege that element. See id. at 1032. The Court explained that "'the indictment must allege the elements of the offense charged and the facts which inform the defendant of the specific offense with which he is charged.' An indictment's failure to 'recite an essential element of the charged offense is not a minor or technical flaw . . . but a fatal flaw requiring dismissal of the indictment.'" Id. (citations omitted).

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[3] An evidentiary hearing is the only way to assure that there is a complete and impartial determination of whether the defendant knowingly and voluntarily waived his rights. Surely, this Court would not rely on the assertions of the *opposing* party in determining whether the waiver of the Sixth Amendment right to counsel was knowing and voluntary. The waiver of important rights guaranteed by the Fifth Amendment should be no different.

There is no logical reason to hold the government to a lesser standard when it is proceeding by information. Nor can any credible argument be made that the common law element of specific intent does not apply to an attempted violation of section 1325, as it would other attempt crimes. Plainly, in the context of a misdemeanor prosecution, the information serves the same purpose as an indictment -- that is, to put the defendant on notice of the elements of the crime with which he or she is charged. See id. That did not happen here. The government failed to allege an essential element -- specific intent -- and thus the information must be dismissed.

III.

CONCLUSION

For the reasons stated above, Mr. Galvan-Velasquez respectfully requests that the Court grant the foregoing motions.

Respectfully submitted,

/s/ Devin J. Burstein

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